93-5418

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORRIN S. REED,

Petitioner-Appellant,

v.

DICK CLARK and INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

The Interstate Agreement on Detainers ("the IAD"), 18 U.S.C. App., is a federal law and compact signed by 48 states and the federal government which sets out the rights of individuals who are subject to trial in one jurisdiction while in the custody of another jurisdiction's correctional facilities.

The question presented is:

Did the court of appeals err by extending the reasoning of Stone v. Powell to bar federal habeas review of a state prisoner's claim that he was being held in custody in violation of the IAD, a "law[] . . . of the United States," particularly in light of the fact that the decision below: (a) is the fourth conflicting approach taken by the circuits to habeas claims based on IAD violations and thus thwarts Congress's intention to provide uniformity on detainers; and (b) conflicts with the language of the IAD and the holdings or rationale of several decisions of this Court, including Stone v. Powell, the decision upon which it purports to rely?

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Petitioner, Orrin Scott Reed, respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit denying petitioner a writ of habeas corpus and declining to overturn his theft conviction.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit affirming the District Court's denial of a writ of habeas corpus and denying rehearing and rehearing in banc, with the dissent from the denial of rehearing in banc, is reported as Reed v. Clark, 984 F.2d 209

(7th Cir. 1993) (Pet. App. 1-6). The decision of the United States District Court for the Northern District of Indiana denying petitioner's writ of habeas corpus is unreported. Reed v. Clark, Civ. No. S 90-226 (Sept. 21, 1990) (Pet. App. 7-18).

The decision of the Indiana Supreme Court affirming petitioner's theft conviction is reported as Reed v. State, 491 N.E.2d 182 (Ind. 1986) (Pet. App. 19-26). The decision of the Indiana Supreme Court denying post-conviction relief is unreported. Reed v. State, No. 25A04-8903-PC-00095 (Ind. April 30, 1990) (Pet. App. 27).

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) (1988) to review the judgment of the Seventh Circuit denying his petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254 (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Constitution, Art. 1, § 10, cl. 3.

This case involves the Interstate Agreement on Detainers, 18 U.S.C. App. at 702-05 (1988), which is set out in full in the Appendix. (Pet. App. 28-31).

This case also involves the following provisions of the United States Code:

28 U.S.C. § 2241(c)(3) (1988):

> (c) The writ of habeas corpus shall not extend to a prisoner unless --
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;

28 U.S.C. § 2254(a) (1988):

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2255 (1988):

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

The IAD is a federal law and an interstate compact, designed to create a uniform system of interjurisdictional transfers while alleviating the disabilities imposed upon prisoners subject to such transfers. See 18 U.S.C. App. at

702-05 (Pet. App. 28-31). The IAD, which is signed by the federal government, 48 states including Indiana,[1] and several United States territories, is sanctioned by Congress under the Compact Clause of the Constitution, and is a law of the United States within the meaning of section 2254. Carchman v. Nash, 473 U.S. 716, 719 (1985); Cuyler v. Adams, 449 U.S. 433, 438 (1981).

The IAD provides specific rights to transferred prisoners. One of these rights is speedy trial within 120 days of a transfer absent good cause shown in open court. Article IV(c), 18 U.S.C. App. § 2, at 703 (Pet. App. at 29). The IAD mandates dismissal with prejudice of the receiving state's criminal charges if the transferred prisoner is not tried within that time. Art. V(c), 18 U.S.C. App. § 2, at 703-04 (Pet. App. at 29-30). To ensure that the rights and remedies contained in the IAD are followed, Congress specifically directed the federal courts to "enforce the agreement on detainers." 18 U.S.C. App. § 5, at 705 (Pet. App. at 31).

Through the IAD, the State of Indiana obtained custody of petitioner from the federal government to try him on a charge of theft of $4666. Petitioner filed a motion alerting the court and prosecutor of his rights under the

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[1] Only Louisiana and Mississippi have chosen not to join the IAD.

IAD.[2] Moreover, the trial judge and prosecutor had signed an acknowledgement of their IAD obligations before petitioner was transferred. (R. 10.) Nevertheless, Indiana failed to adhere to the IAD's 120 day speedy trial requirement.

After the 120 day period ran without a trial, petitioner moved the state court to dismiss the criminal charge, as the IAD requires for violation of this provision. (R. 127-28.) The state court denied this motion.[3] Petitioner was then tried and convicted of the theft charge. Petitioner, who was 51 at the time, was sentenced as an habitual offender under Indiana law to a term of 34 years in prison.[4]

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[2] Indeed, petitioner raised IAD claims on more than one occasion. Petitioner first filed a pro se motion raising general IAD issues. (R. 45.) After an untimely trial date was nevertheless set, petitioner filed pro se motions specifically warning the Indiana court of the running of the IAD's speedy trial provision and noting the number of days that he had been in Indiana's custody. (R. 77-78; 90; 103.)

[3] It cannot be disputed that petitioner was prejudiced by the detainer. In response to petitioner's first pro se motion regarding the IAD, the Indiana trial court itself acknowledged that petitioner was incapable of preparing or presenting his defense from his prison cell:

> It has become apparent to the Court through pretrial proceedings this far held, that the defendant will be incapable of presenting the kind of defense which he has contemplated to date because of his incarceration.

(R. 83.) Absent the detainer, petitioner could have prepared for trial while living in a federal community center. (R. 53.)

[4] The court based its habitual offender sentence on 32 and 24 year old convictions for "setting fire to a car" and larceny. (Pet. App. 25.)

Petitioner appealed the denial of his IAD dismissal motion to the Indiana Supreme Court, which affirmed without reaching the merits of the IAD claim. (Pet. App. 19-26.) The Court acknowledged that petitioner "had made a general demand that trial be held within the time limits of the IAD," but held that petitioner, who was proceeding pro se, had failed to object orally to the setting of untimely trial dates. (Pet. App. at 22.) The Indiana Supreme Court did not cite to any rule requiring an oral motion as well as a written motion, so there was no actual procedural default by petitioner.

After fully exhausting his state court remedies, petitioner raised his IAD claim in a pro se federal habeas petition. The federal district court rejected petitioner's IAD claim after considering the claim on the merits. (Pet. App. 7-18.) According to the district court, the IAD's 120 day period should be tolled during the pendency of motions filed by the petitioner. (Pet. App. at 15-16.)

On appeal, the court of appeals affirmed the district court's decision without considering the merits of petitioner's properly preserved IAD claim. (Pet. App. 1-6.) The court of appeals began by expressly recognizing that it was ignoring the approaches taken by other circuits for reviewing state court decisions on IAD violations. (Pet. App. at 3.) Rather than consider IAD violations as it would constitutional violations, as some circuits do, or subject IAD violations to the higher test of whether the violation

resulted in a "miscarriage of justice," as others do, the court of appeals elected to extend the analysis of Stone v. Powell, 428 U.S. 465 (1976), to IAD violations. (Pet. App. at 3-5.) Concluding that "one complete round of litigation" was enough, the court of appeals held that collateral review of claims under the IAD was unavailable unless the state court had declined to consider the defendant's arguments. (Pet. App. at 4.)

Because the court's decision further splintered the existing circuit split on the cognizability of IAD violations, Mr. Reed filed a petition for rehearing with a suggestion of rehearing in banc. Petitioner also identified inconsistencies between the decision below and this Court's decisions which warranted rehearing.

The petition for rehearing was denied by the Seventh Circuit, with two judges voting for rehearing in banc. One judge filed an opinion dissenting from the denial of rehearing in banc, noting that the case dealt "with a difficult problem upon which the circuits are in disarray and upon which the Supreme Court has given little firm guidance." (Pet. App. at 5-6.) The dissent also noted that the disarray among the circuits defeated the IAD's purpose of having a national uniform method of transferring federal prisoners to state courts. (Pet. App. at 6.)

As a consequence of the decision below, petitioner, who is now 62 years old, is serving the functional equivalent of a life sentence for a state theft charge even though in

some circuits he would have obtained dismissal of the theft charge in habeas corpus proceedings. This disparity is unacceptable under a federal law designed to institute a uniform system for transferred prisoners.

REASONS FOR GRANTING THE WRIT

I.

This Court should review the decision below to resolve a persistent circuit split on the scope of habeas review of a supposedly uniform federal law and interstate compact. The circuits have splintered when applying the habeas statute to IAD violations, as three Justices of this Court had noted even before the decision below, which added a fourth approach to the disarray. See Fex v. Michigan, 113 S. Ct. 1085, 1092 n.1 (1993) (Blackmun and Stevens, JJ., dissenting); Metheny v. Hamby, 488 U.S. 913, 913 & n.2 (1988) (White, J., dissenting from denial of certiorari). Nine of the 13 circuits have now spoken on the issue, many more than once. The existence of multiple interpretations of available collateral relief defeats the IAD's purpose of ensuring uniform treatment of transferred prisoners.

II.

The court of appeals' extension of Stone v. Powell to federal statutes in general, and to the IAD in particular, cannot be reconciled with three of this Court's decisions. First, the decision below conflicts with Brown v. Allen, which established the parameters of federal review of certain

state court rulings concerning federal law. Second, the court of appeals distinguishes between the review of constitutional and federal statutory claims, directly contradicting the holding of Davis v. United States. Finally, the decision below incorrectly extends Stone v. Powell to the review of violations of federal laws, even though this Court expressly limited Stone to violations of judicially created rules.

I.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW COMPOUNDS AN ALREADY-FRACTURED SPLIT AMONG THE CIRCUITS CONCERNING A FEDERAL LAW SPECIFICALLY DESIGNED TO ACHIEVE UNIFORMITY.

A. Before Congress passed the IAD in 1970, persons incarcerated in one jurisdiction having a detainer lodged against them often had to endure serious disabilities. Some served a complete sentence in one jurisdiction without knowing whether they would face trial in the other jurisdiction. Often, they could not obtain a speedy trial in the second jurisdiction and could not assist in their own defense in a timely fashion. Those trials, delayed by the incarceration, might be less reliable as witnesses' memories dimmed and evidence aged. Detainers often made conditions of incarceration harsher, too. These inmates were kept in close custody because of the pending detainer and thus were ineligible for desirable work assignments. Others were shuttled between jurisdictions and thus lost valuable

rehabilitation opportunities. Carchman v. Nash, 473 U.S. 716, 719-21 (1985).

This Court recognized that some of these conditions were unconstitutional. In Smith v. Hooey, 393 U.S. 374 (1969) and in Dickey v. Florida, 398 U.S. 30 (1970), the Court held that state prisoners retained their right to speedy trials even if the states were unable to try the defendants because they were in federal custody. Congress enacted the IAD shortly afterward to vindicate prisoners' constitutional right to speedy trials and to prevent the need to reverse convictions. Carchman v. Nash, 473 U.S. at 731 n.9; S. Rep. No. 1356, 91st Cong. 2d Sess. 3 (1970), reprinted in 1970 U.S.C.C.A.N. 4864, 4866 (noting that IAD would "diminish possibility of convictions being vacated or reversed because of denial of speedy trial right"); see also United States ex rel. Escola v. Groomes, 520 F.2d 830, 834 n.11 (3d Cir. 1975).

In particular, Article IV(c) of the IAD dictates that, following transfer pursuant to the IAD, "trial shall be commenced within one hundred twenty [120] days of the arrival of the prisoner in the receiving State, but for good cause shown in open court." Art. IV(c), 18 U.S.C. App. § 2, at 703 (Pet. App. at 29). Article V(c) sets forth the remedy if the trial is not commenced within the 120-day period: the detainer "shall cease to be of any further force or effect," and the court "shall enter an order dismissing the [indictment, information, or complaint] with prejudice."

Art. V(c), 18 U.S.C. App. § 2, at 704 (Pet. App. at 30). Finally, Congress directed "[a]ll courts . . . of the United States . . . to enforce the agreement on detainers . . . ." 18 U.S.C. App. § 5, at 705 (Pet. App. at 31); see also Texas v. New Mexico, 462 U.S. 554, 564 (1982) (noting that interstate compacts' unique nature prohibits courts from "order[ing] relief inconsistent with [their] express terms").

Despite the plain language with which the IAD sets forth the speedy trial right, remedy, and federal court enforcement, the circuits have splintered on how to conduct collateral review of federal statutes in general, and the IAD in particular.[5/] Panels in the Third, Fifth, and Ninth Circuits have granted relief under section 2254 on IAD claims by treating claims based on violations of federal statutes in the same manner as claims based on violations of the Constitution. See Birdwell v. Skeen, 983 F.2d 1332, 1341 (5th Cir. 1993); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980); United States ex rel. Escola v. Groomes, 520 F.2d 830, 839 (3d Cir. 1975); see also Mars v. United States, 615 F.2d 704, 710 (6th Cir.) (Edwards, C.J., dissenting) (urging that no higher standard should apply to non-constitutional claims

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[5/] In five cases in the past eight years, Justice White has urged this Court to resolve the question of under what circumstances an IAD violation is cognizable on habeas. Seymore v. Alabama, 488 U.S. 1018 (1989) (White, J. dissenting from denial of certiorari); Metheny v. Hamby, 488 U.S. 913 (1988) (White, J., dissenting from denial of certiorari); Bryant v. United States, 488 U.S. 916 (1988) (White, J. dissenting from denial of certiorari); Haskins v. Virginia, 484 U.S. 1037 (1988) (White, J., dissenting from denial of certiorari); Kerr v. Finkbeiner, 474 U.S. 929 (1985) (White, J., dissenting from denial of certiorari).

as suggested by Strobel v. Anderson, 587 F.2d 830 (6th Cir. 1978)), cert. denied, 449 U.S. 849 (1980); United States v. Williams, 615 F.2d 585, 589-90 (3d Cir. 1980) (granting relief under § 2255 for IAD violation).

Panels in eight circuits have required that statutory claims demonstrate "a miscarriage of justice" or "exceptional circumstances" before granting habeas relief, but split among themselves when determining whether IAD violations meet that standard. Panels in the Seventh and Ninth Circuits have concluded that IAD violations meet the "miscarriage of justice" standard because Congress made an IAD violation an absolute defense to prosecution. Webb v. Keohane, 804 F.2d 413, 414 (7th Cir. 1986); Tinghitella v. California, 718 F.2d 308, 311 (9th Cir. 1983) (reading an "exceptional circumstances" requirement into Cody). In contrast, panels in the First, Second, Third, Fourth, Sixth, and Eleventh Circuits have concluded that IAD violations do not meet the miscarriage of justice standard or that the petitioner must show serious prejudice (in addition to the failure to be released) caused by the violation. Reilly v. Warden, FCI Petersburg, 947 F.2d 43, 44-45 (2d Cir. 1991), cert. denied, 112 S. Ct. 1227 (1992); Seymore v. Alabama, 846 F.2d 1355, 1359 (11th Cir. 1988), cert. denied, 488 U.S. 1018 (1989); Metheny v. Hamby, 835 F.2d 672, 675 (6th Cir. 1987), cert. denied, 488 U.S. 913 (1988); Casper v. Ryan, 822 F.2d 1283, 1290 (3d Cir. 1987) (distinguishing Escola and suggesting that "mandatory sanction of dismissal was just one

of the factors" that led the Court in United States v. Williams, 615 F.2d 585 (3d Cir. 1980), to grant habeas relief), cert. denied, 484 U.S. 1012 (1988); Kerr v. Finkbeiner, 757 F.2d 604, 607 (4th Cir.) (no claim in absence of prejudice), cert. denied, 474 U.S. 929 (1985); Fasano v. Hall, 615 F.2d 555, 558-59 (1st Cir.), cert. denied, 449 U.S. 867 (1980).[6/]

The court of appeals below summarily rejected these three approaches to section 2254 claims based upon violations of federal law as "unlikely to get [the court] anywhere." (Pet. App. at 3.) Instead, the court held that the rationale of Stone v. Powell, 428 U.S. 465 (1976), governed whether IAD violations asserted by state prisoners were cognizable under section 2254. According to this fourth approach, an IAD violation is not cognizable in habeas corpus proceedings unless the state courts have failed to entertain and resolve the claim. (Pet. App. at 5.) This approach effectively abdicates federal habeas corpus review of state court resolutions of claimed IAD violations, thus frustrating the directive of Congress that the federal courts enforce the IAD. 18 U.S.C. App. § 5, at 705 (Pet. App. at 31).

[6/] Even under this approach, in which petitioner must demonstrate prejudice, Mr. Reed was clearly prejudiced by the State's IAD violation. Once his federal sentence ended, Mr. Reed remained in a county jail until his trial solely because of the detainer. The Indiana trial court recognized that this interfered with his ability to defend himself on the theft charges. See supra note 3.

B. The need to resolve this compound fracture among the circuits is especially great here because the disarray among the circuits interferes with the IAD's purpose of providing a uniform method for the interjurisdictional transfer of prisoners. At the present time, two inmates transferred from the same federal correctional facility to states in different circuits whose trials are not conducted within 120 days may have diametrically opposite results in their habeas actions: the inmate whose trial is delayed in Texas will have the state criminal charges dismissed upon habeas review; the inmate whose trial is delayed in Indiana, however, will have only the habeas corpus petition dismissed. Uniformity -- an important goal of the IAD -- is thereby defeated.

Because the IAD is a federal law, this Court is the ultimate tribunal for resolving disputes over the meaning of its provisions. See Cuyler, 449 U.S. at 442 (holding that the IAD is an interstate compact the interpretation of which presents a question of federal law); West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951) ("Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts."); Bush v. Muncy, 659 F.2d 402, 413 (4th Cir. 1981) ("the IAD will over time be subjected to the uniform interpretation which, as federal law, it must be given"). Over the years, the Supreme Court has exercised this authority on a number of occasions, most recently this

term. Fex v. Michigan, 113 S. Ct. 1085 (1993); see also Carchman v. Nash, 473 U.S. 716 (1985); Cuyler v. Adams, 449 U.S. 433 (1981); United States v. Mauro, 436 U.S. 340 (1978) (noting certiorari granted because of circuit conflict). Significantly, this review has occurred on both direct and collateral review. Compare Fex, 113 S. Ct. at 1088 (direct review of Michigan Supreme Court decision) with Carchman, 473 U.S. at 722 (habeas review under § 2254). See also Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 485 (1973) (holding that district court erred in dismissing § 2254 detainer claim for lack of jurisdiction).

Review by this Court is especially necessary and appropriate here. Unlike circuit conflicts over differing interpretations of most federal statutes, which Congress can resolve by legislative action, the IAD is an interstate compact which cannot be clarified or revised by Congress alone. See Carchman, 473 U.S. at 749 n.18 (Brennan, J. dissenting). Consequently, the only means to attain uniformity is this Court's review. Recognizing this, Congress directed the federal courts to enforce the provisions of the IAD and gave federal courts the power to ensure that the IAD's purposes, which include uniformity, are fulfilled. See 18 U.S.C. App. § 5, at 705 (Pet. App. at 31). The approach of the court of appeals below -- the fourth adopted by the circuits -- simply ignores this congressional directive.

Nor does federal review of the IAD impinge on state comity interests. By voluntarily signing a compact that is a federal law, the 48 state signatories explicitly acquiesced to federal court review. See Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 281-82 (1959) (by accepting and acting under compact, parties assume whatever conditions Congress imposed when it consented to compact). The majority of the states -- including Indiana -- signed the IAD after the federal government became a signatory. None of the prior members exercised the right to withdraw, provided by Article IX, after the federal government became a party to the IAD. See S. Rep. No. 1356, 91st Cong. 2d Sess. 2-3, reprinted in 1970 U.S.C.C.A.N. 4864, 4866-67. Thus, all 48 of the signatory states were aware that federal courts would be reviewing their state courts' decisions on the IAD and nevertheless chose to participate. For these reasons, federal review of state court IAD violations is entirely appropriate.

II.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S DECISIONS IN BROWN, DAVIS, AND STONE.

The decision below, barring collateral review of federal statutes unless the state court declined to consider the defendant's argument, is inconsistent with this Court's decision in Brown v. Allen, 344 U.S. 443 (1953), Davis v. United States, 417 U.S. 333 (1974), and Stone v. Powell,

428 U.S. 465 (1976). Review by this Court is necessary to correct the serious error made by the court below.[7]

In Brown v. Allen, 344 U.S. 443 (1953), this Court authorized federal courts to re-examine, under 28 U.S.C. § 2254, subjects that had been addressed by state courts. Although Brown dealt with constitutional violations, it made no distinction between constitutional and statutory claims when establishing broad review powers over the state courts. Contrary to Brown, the court of appeals below narrowed the review given to claims based upon violations of federal statutes. (Pet. App. at 2-3.) That conclusion is contrary to the plain language of 28 U.S.C. § 2254, which provides relief if a person is "in custody in violation of the Constitution or laws or treaties of the United States." Because the habeas statute does not distinguish among the Constitution, laws and treaties, neither should the federal courts. See, e.g., United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("plain language of legislation should be conclusive"). Indeed, as Justice Frankfurter observed in Brown v. Allen, "the wisdom of . . . a modification in the [habeas] law is for Congress to

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[7] In addition to the IAD, the ruling below would affect claims brought under the federal wiretap statute, 18 U.S.C. § 2515 et seq. See, e.g., Hussong v. Warden, Wisc. State Reformatory, 623 F.2d 1185, 1190 (7th Cir. 1980) (applying "miscarriage of justice" standard to state court violation of wiretap statute); Adams v. Lankford, 788 F.2d 1493, 1500 (11th Cir. 1986) (same); Llamas-Almaguer v. Wainwright, 666 F.2d 191, 193-94 (5th Cir. 1982) (same); Vitello v. Gaughan, 544 F.2d 17, 18-19 (1st Cir. 1976) (same), cert. denied, 431 U.S. 904 (1977).

consider . . . . It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress." 344 U.S. at 500.

The decision below also conflicts with Davis v. United States, 417 U.S. 333 (1974), in which this Court refused to treat statutory and constitutional claims differently. Davis presented this Court with a habeas corpus challenge to a federal conviction under 28 U.S.C. § 2255. The claim, which challenged federal custody as violating a federal law, had not been presented to the federal courts on direct appeal. 417 U.S. at 342. The government argued that statutory claims were less important and urged this Court to eliminate habeas review for statutory claims. 417 U.S. at 342. This Court rejected that argument, holding instead that the standard for collateral review under section 2255 is the same "whether the claim had its source in the Constitution or in the 'laws of the United States.'" 417 U.S. at 346. The decision below is inconsistent with that holding.

Decisions by the circuits that apply a "miscarriage of justice" standard to section 2254 claims of IAD violations (or to other section 2254 claims that state custody is in violation of federal law) also are inconsistent with Davis. That inconsistency results from a misreading of Davis. Rather than distinguish between constitutional and statutory claims, the Court in Davis imposed a higher standard before relief would be granted as to all claims for which prior

federal court review of the alleged error of federal law had occurred:

> whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t ... present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.

417 U.S. at 346 (quoting another § 2255 case, Hill v. United States, 368 U.S. 424, 428 (1972)).

As would be expected, the Davis "miscarriage of justice" standard has since been applied when habeas petitioners have failed to preserve properly their claims or have brought their claim in an unusual way. For example, the standard has been applied when section 2255 petitioners failed to raise constitutional claims in their direct federal appeal and have first asserted them on collateral review. See, e.g., United States v. Johnson, 615 F.2d 1125, 1127 (5th Cir. 1980). In addition, a "miscarriage of justice" standard has been applied when section 2254 petitions are subject to defenses of successive claims, abuse of the writ, or procedural default. See, e.g., Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992). But this court has never applied this standard to properly preserved and presented section 2254 claims.

Finally, the decision below conflicts with the very decision upon which it purports to rely. In Stone v. Powell, 428 U.S. 465 (1976), this Court held that federal habeas review of a purported Fourth Amendment violation is available only when the state court has failed to address that claim.

Stone's reach is very short. As this Court explained, Stone is "not concerned with the scope of the habeas corpus statute" but rather with the scope of the exclusionary rule, "a judicially created remedy." Id. at 495 n.37 (1976) (Court's emphasis). Since 1976, this Court repeatedly has declined to extend the reasoning of Stone v. Powell beyond its original bounds: the collateral review of Fourth Amendment exclusionary rule violations. See Withrow v. Williams, 113 S. Ct. 1745 (1993) (declining to extend Stone to Miranda claims); Kimmelman v. Morrison, 477 U.S. 365 (1986) (declining to extend Stone to Sixth Amendment ineffective assistance of counsel claims); Rose v. Mitchell, 443 U.S. 545 (1979) (declining to extend Stone to equal protection claims); Jackson v. Virginia, 443 U.S. 307 (1979) (declining to extend Stone to due process claims under Fourteenth Amendment).

These cases demonstrate, as Justice O'Connor recently explained, that:

> decisions concerning the availability of habeas relief warrant restraint. Nowhere is the Court's restraint more evident than when it is asked to exclude a substantive category of issues from relitigation on habeas.

Withrow, 113 S. Ct. at 1758 (O'Connor, J.) (concurring in part, dissenting in part). Indeed, no circuit has applied the rationale of Stone to violations of federal statutes since it was decided seventeen years ago. Cf. Hussong, 623 F.2d at 1187-90 (applying Stone v. Powell test to Fourth Amendment exclusionary rule claim but applying "miscarriage

of justice" to statutory federal wiretap claim); Fasano, 615 F.2d at 558-59 & n.* (comparing IAD violations to Fourth Amendment claims contained in Stone, but applying Davis test to IAD violations).

More importantly, the rationale of Stone is inapplicable to habeas claims raising a violation of the IAD. The Court was influenced in Stone by the "prophylactic" nature of the judicially created exclusionary rule, which had broader reach than was required by the Fourth Amendment upon which it was based. The rule itself was not mandated by federal law or the Constitution. Thus, this Court concluded that the exclusionary rule's scope and application was entirely within the Court's control.

Here, however, the Court addresses a federal law and interstate compact, not a judicially created rule. Rather than leave it to the courts to fashion a prophylactic test, Congress required the state courts to try federal prisoners transferred to them within 120 days or dismiss the charges with prejudice. And Congress has mandated that the federal courts "enforce the agreement on detainers." 18 U.S.C. App. § 5, at 705 (Pet. App. at 31). Thus, this Court's cost-benefit analysis in Stone, which was formulated to define the scope of a remedy that it alone created, does not apply to the task of interpreting rights and remedies created and sanctioned by Congress. See Hussong, 623 F.2d at 1190 (refusing to extend Stone to federal wiretapping act

because the "exclusionary rule in the wiretap statute was created by the legislature, not the courts").

Moreover, Stone stressed the need to balance habeas review's value in preventing future violations (the rationale for the exclusionary rule) against state comity interests. 428 U.S. at 493. This balancing test is easily administered here because enforcing IAD violations does not interfere with state comity. The parties to the IAD, including 48 states, agreed to create and enforce a speedy trial right for prisoners transferred pursuant to the IAD. The remedy they agreed upon for violations of the speedy trial right was mandatory dismissal of the charges with prejudice. Collateral review here does not involve forcing the states to abide by a rule created by the federal courts; rather it involves uniform enforcement of the plain language of a compact to which the signatory states agreed. This does not intrude upon state comity.

Finally, this Court's decision in Withrow eliminates any remaining support for the rationale of the decision below.[8/] The court of appeals below supported its ruling that state court review of federal statutory claims

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[8/] Less than a week before rehearing was denied, this Court decided Withrow v. Williams, 113 S. Ct. 1745 (1993), which holds that the restriction on the exercise of federal habeas jurisdiction in Stone v. Powell does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by Miranda v. Arizona, 384 U.S. 436 (1966). Petitioner provided the Withrow opinion to the court of appeals pursuant to Federal Rule of Appellate Procedure 28(j) and Circuit Rule 28(j), but the court below did not acknowledge that decision in any way.

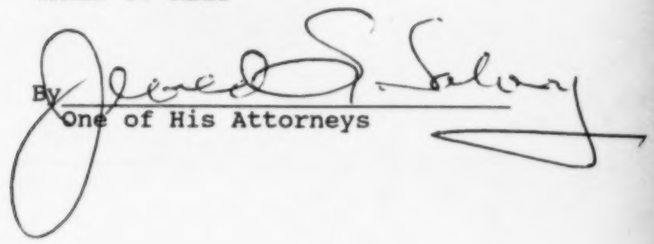
precluded collateral review by citing: (1) Stone v. Powell; (2) Justice O'Connor's concurrence in Duckworth v. Eagan, 492 U.S. 195, 205-14 (1989); and (3) this Court's grant of certiorari in Withrow. (Pet. App. at 4.) But in Withrow, this Court once again declined to extend the reasoning of Stone v. Powell to other claims, rejecting the Duckworth concurrence, and affirming the court of appeals' decision in Withrow. Thus, the decision below lacks any support for extending Stone v. Powell to state prisoners' habeas claims of federal statutory violations.

CONCLUSION

For the foregoing reasons, petitioner Orrin Scott Reed respectfully requests that this Court grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ORRIN S. REED

By: 
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Dated: July 26, 1993

APPENDIX
OF
PETITIONER-APPELLANT

APPENDIX
TABLE OF CONTENTS

Orrin Scott REED, Petitioner-Appellant,

v.

Dick CLARK, Superintendent, and Attorney General of Indiana, Respondents-Appellees.

No. 90-3264.

United States Court of Appeals,

Seventh Circuit.

Argued Dec. 9, 1992.

Decided Jan. 19, 1993.

Rehearing and Rehearing In Banc Denied April 27, 1993.

Petitioner appealed from order of the United States District Court for the Northern District of Indiana, Allen Sharp, Chief Judge, denying his petition for writ of habeas corpus. The Court of Appeals, Easterbrook, Circuit Judge, held that receiving state's alleged failure to try petitioner within 120 days of arrival, in violation of Interstate Agreement on Detainers, was not grounds for federal habeas relief.

Affirmed.

Cudahy, and Ripple, Circuit Judges, voted for rehearing in banc.

Ripple, Circuit Judge, filed an opinion dissenting from denial of rehearing in banc.

1. Habeas Corpus ⇐509(1)

Indiana's alleged violation of its own procedures for establishing petitioner's status as habitual offender was not ground for federal habeas relief. 28 U.S.C.A. § 2254(a).

2. Habeas Corpus ⇐526

Receiving state's alleged failure to try petitioner within 120 days of arrival, in violation of Interstate Agreement on Detainers (IAD), was not grounds for federal habeas relief, where state court resolved defendant's claim under IAD. 28 U.S.C.A. § 2254(a).

3. Habeas Corpus ⇐526

Unless state fails to entertain and resolve claims under the Interstate Agreement on Detainers (IAD), collateral review is unavailable in federal court. 28 U.S.C.A. § 2254(a).

4. Habeas Corpus ⇐526

Whether federal prisoner had right to hearing under Interstate Agreement on Detainers (IAD) before he was transferred to state custody could not be addressed in federal habeas proceeding. 28 U.S.C.A. § 2254(a).

Thomas J. McCarthy (argued), Jerold S. Solovy, Barry Sullivan, Scott I. Hamilton, Sharon L. Beckman, Jenner & Block, Chicago, IL, for petitioner-appellant.

Michael A. Schoening, Wayne E. Uhl (argued), Dist. Attys. Gen., Sharon L. Wright, Federal Litigation, Indianapolis, IN, for respondents-appellees.

Before POSNER and EASTERBROOK, Circuit Judges, and WOOD, Jr., Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

While serving time in federal prison, Orrin Scott Reed was indicted by Indiana on a charge of theft. Indiana asked the United States to deliver Reed for trial under the Interstate Agreement on Detainers. Indiana took custody of Reed on April 27, 1983. Article IV(c) of the IAD provides that "trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court ... may grant any necessary or reasonable continuance." Indiana thus had until August 25, 1983, to put Reed on trial or extend the time for "good cause shown in open court". Article V(c) prescribes dismissal of the charges, with prejudice, as the consequence of excessive delay.

Reed's trial began on October 18, 1983. Reed consented to a postponement from the scheduled date of September 13, but even that date was beyond the 120 days the IAD allows. He was convicted and sentenced to 34 years' imprisonment as an habitual offender. The Supreme Court of Indiana affirmed, concluding that Reed (who was serving as his own counsel) should have alerted the trial judge during hearings on June 27 and August 1 at which the trial date was set and then postponed. *Reed v. State*, 491 N.E.2d 182, 185 (Ind. 1986). Had Reed reminded the judge of the 120-day limit during either of these hearings, instead of burying his demand in a flood of other documents, the court could have complied with the IAD's require-

ments. A collateral attack in state court foundered when the inferior courts treated the Supreme Court's decision as conclusive. Reed then turned to federal court, which did not mention the state court's reason and instead held that Reed's many motions accounted for "a significant amount of the delay" and thus established "good cause" under Article IV(c).

[1] A federal court may grant collateral relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). That principle immediately disposes of Reed's argument that Indiana failed to comply with its own procedures for establishing his status as an habitual offender. The premise is wrong, for the Supreme Court of Indiana, whose word on questions of state law is authoritative, concluded that the state had followed its own rules. 491 N.E.2d at 188–89. But it would not matter if Indiana were out of compliance with state law. "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, — U.S. —, —, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991). See also, e.g., *Jones v. Thieret*, 846 F.2d 457 (7th Cir.1988). Nothing is to be gained by insisting, as Reed does, that Indiana violated the Constitution by misapplying its laws. Metamorphosing state into constitutional law is inconsistent with many decisions. E.g., *Snowden v. Hughes*, 321 U.S. 1, 8–11, 64 S.Ct. 397, 401–02, 88 L.Ed. 497 (1944); *Archie v. Racine*, 847 F.2d 1211, 1216–18 (7th Cir.1988) (in banc).

[2] The Interstate Agreement on Detainers also is a state law—but because it is an interstate compact, it is a law of the United States as well. *Carchman v. Nash*, 473 U.S. 716, 719, 105 S.Ct. 3401, 3403, 87 L.Ed.2d 516 (1985); *Cuyler v. Adams*, 449 U.S. 433, 438–42, 101 S.Ct. 703, 706–09, 66 L.Ed.2d 641 (1981). Recognizing that violations of federal statutes are less likely than violations of the Constitution to lead to collateral relief, see *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979); *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974); *Hill v. United States*, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962); *Sunal v. Large*, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982 (1947), Reed tries to "constitutionalize" the IAD, but this maneuver works no better on the IAD than on Indiana's rules for establishing habitual-offender status. Reed contends: "[T]he IAD's mandatory language establishes a liberty interest protected by the due process clause of the Fifth and Fourteenth Amendments. The State of Indiana therefore violated Mr. Reed's due process guarantees and his IAD right when the State failed to try him within 120 days." Yet all the IAD does is prescribe procedures: hearing before transfer, trial within 120 days of arrival, and so on. Procedures for adjudication are neither "liberty" nor "property" for constitutional purposes. *Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). Statutes and rules establish liberty or property interests only to the extent they prescribe substantive rules of decision. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460–63, 109 S.Ct. 1904, 1908–10, 104 L.Ed.2d 506 (1989); *Wallace v. Robinson*, 940 F.2d 243 (7th Cir.1991) (in banc); *Doe v. Milwaukee County*, 903 F.2d 499 (7th Cir.1990). When a state does not comply with a procedure specified in a statute or rule, it has violated that statute or rule, nothing more. Reed can succeed on this collateral attack, therefore, only by persuading us to reopen a statutory question decided adversely to him by the Supreme Court of Indiana.

Although § 2254(a) permits a court to issue a writ of habeas corpus to end custody that violates laws of the United States, the Supreme Court has yet to decide when such relief is appropriate. Indeed, the Court has yet to decide whether *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), which authorizes reexamination of subjects addressed by state courts, applies to claims based on federal statutes. Nothing in the text of § 2254 suggests a difference between the treatment of statutory and constitutional arguments, but the Court nonetheless has been chary of equating the two, lest collateral review become a rerun of the direct appeal. *Sunal*, *Hill*, and *Timmreck* say that statutory arguments ordinarily may not be raised collaterally. These cases were decided under 28 U.S.C. § 2255, which applies to federal prisoners, but the language of § 2254 and § 2255 is identical in all material respects, and the Court has concluded that the two are "identical in scope". *Davis*, 417 U.S. at 343, 94 S.Ct. at 2304.

Sunal and its successors hold that there is a difference between "custody in violation of the ... laws ... of the United States" and a violation of those laws by the state. "To show that 'the custody'—and not simply the custodian—violates the law, the prisoner must at a minimum trace the prejudicial effect of the error." *White v. Henman*, 977 F.2d 292, 295 (7th Cir.1992). *Davis* and *Hill* call on us to search for "exceptional circumstances" amounting to "a fundamental defect which inherently results in a complete miscarriage of justice". 417 U.S. at 346, 94 S.Ct. at 2305, quoting from 368 U.S. at 428, 429, 82 S.Ct. at 471, 472. Unfortunately, such formulas rarely settle concrete disputes. What is "exceptional" depends on your point of view. Some courts have concluded that the IAD does not create a "fundamental" right and that violations rarely if ever result in a "miscarriage of justice". E.g. *Fasano v. Hall*, 615 F.2d 555 (1st Cir.1980); *Edwards v. United States*, 564 F.2d 652 (2d Cir. 1977); *Kerr v. Finkbeiner*, 757 F.2d 604 (4th Cir.1985); *Metheny v. Hamby*, 835 F.2d 672 (6th Cir.1987); *Greathouse v. United States*, 655 F.2d 1032 (10th Cir. 1981); *Seymore v. Alabama*, 846 F.2d 1355 (11th Cir.1988). Others have reached a contrary conclusion, pointing to the IAD's remedy: dismissal with prejudice. Surely it is a miscarriage of justice to hold in prison a person who should have been released outright, these courts believe. *United States v. Williams*, 615 F.2d 585, 589–90 (3d Cir.1980); *Gibson v. Klevenhagen*, 777 F.2d 1056 (5th Cir.1985); *Cody v. Morris*, 623 F.2d 101 (9th Cir.1980). Controversy has developed within two of these circuits as judges debate which parts of the IAD are "fundamental" and which are not. E.g., *Cooney v. Fulcomer*, 886 F.2d 41, 44 (3d Cir.1988); *Carlson v. Hong*, 707 F.2d 367, 368 (9th Cir.1983). Our circuit has not taken a position on this subject. We have recognized that the IAD is a law of the United States without delineating the circumstances under which its violation leads to collateral relief. *Webb v. Keohane*, 804 F.2d 413 (7th Cir.1986); *Esposito v. Mintz*, 726 F.2d 371 (7th Cir.1984).

Verbal analysis of "fundamental defect" or "miscarriage of justice" or "exceptional circumstances" is unlikely to get us anywhere. The meaning of "custody in violation of the ... laws ... of the United States" must depend in large measure on why federal courts ever reexamine decisions reached by state courts. State courts may be hostile to federal norms, and as a practical matter the Supreme Court of the United States can review only a tiny fraction of all state decisions. Constitutional rights, insulated from popular control, are most likely to engender hostility; a majority may very much wish to do things otherwise. Statutory rights are more likely to enjoy majority support, with a correspondingly reduced need for multiple layers of judges. Some states may be out of sympathy with some federal laws, but many of these laws command overwhelming contemporary support. Consider the IAD: this is a federal law by virtue of its status as an interstate compact, but it is also a law of Indiana. We have no more reason to suppose that the Supreme Court of Indiana seeks to undermine the IAD than we have to suppose that it seeks to undermine any other law of Indiana.

The high costs of collateral review influence the proper scope of that enterprise. See *Parke v. Raley*, — U.S. —, 113 S.Ct. 517, 118 L.Ed.2d 318 (1992); *Keeney v. Tamayo-Reyes*, — U.S. —, 112 S.Ct. 1715, 121 L.Ed.2d 391 (1992); *Coleman v. Thompson*, — U.S. —, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *McCleskey v. Zant*, — U.S. —, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436, 444–55, 106 S.Ct. 2616, 2621–28, 91 L.Ed.2d 364 (1986) (plurality opinion); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Mackey v. United States*, 401 U.S. 667, 682–83, 91 S.Ct. 1160, 1174–75, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring); *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992), cert. granted, — U.S. —, 113 S.Ct. 52, 121 L.Ed.2d 22 (1992); *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir.1991), cert. granted, — U.S. —, 112 S.Ct. 2937, 119 L.Ed.2d 563 (1992). It would be otiose to recapitulate these costs, which underlie the limitations expressed in *Sunal*, *Hill*, *Davis*, and *Timmreck*. High costs may be worth bearing to prevent continuing unconstitutional custody, and in one other circumstance: when the confined person is innocent. *Davis*, the only decision of the Supreme Court ever to hold that a person was in "custody in violation of the ... laws ... of the United States", arose out of such a situation. After Davis had been convicted, the court of appeals held in a different case that the acts of which he had been

accused did not constitute a crime. Imprisoning a person whose acts are not illegal, *Davis* concluded, creates "custody in violation of the ... laws ... of the United States." *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), expresses a similar thought when holding that federal courts will review state convictions to ensure that a reasonable jury could have found the defendant guilty. Although *Jackson* borders on a search for violations of state law, see *Fagan v. Washington*, 942 F.2d 1155 (7th Cir.1991); *Bates v. McCaughtry*, 934 F.2d 99 (7th Cir.1991), it also emphasizes the special value attached to claims of innocence. See also *Kuhlmann* and, e.g., Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970); Ronald J. Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 Tex.L.Rev. 269 (1977).

Stone v. Powell illustrates the limits of collateral review for errors that do not themselves violate the Constitution. Although the fourth amendment forbids unreasonable searches and seizures, it does not prescribe a remedy for violations. The exclusionary rule, devised to influence the police to respect the rights of suspects, is not constitutionally obligatory—and, *Stone* holds, will not be applied on collateral review unless the state court declines to consider the defendant's arguments. One complete round of litigation on remedial contentions is enough, the Court concluded. See also *Duckworth v. Eagan*, 492 U.S. 195, 205–14, 109 S.Ct. 2875, 2881–86, 106 L.Ed.2d 166 (1989) (O'Connor, J., concurring) (concluding that claims based on *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), should be treated in the same way); *Williams v. Withrow*, 944 F.2d 284 (6th Cir.1991), cert. granted, — U.S. —, 112 S.Ct. 1664, 118 L.Ed.2d 386 (1992).

Against this background, consider some possible interpretations of "custody in violation of the ... laws ... of the United States." Imprisonment may be said to violate the law when:

1. Any step in the process leading to conviction violates federal law; or
2. A violation of federal law in the course of prosecution should lead to dismissal with prejudice; or
3. Compliance with the federal law would prevent conviction; or
4. The state has failed to entertain or resolve a properly raised defense based on federal law; or
5. An innocent person has been convicted.

Davis and *Jackson* hold that condition (5), innocence, requires collateral relief. See also *Kuhlmann* and, e.g., *Sawyer v. Whitley*, — U.S. —, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). *Stone* adds that condition (4) also calls for collateral review. Although the Supreme Court has yet to consider condition (3), a federal law that makes it *impossible* for the state to convict a particular defendant also affords a strong foundation for relief. In such cases a state may be tempted to evade its obligations under the Supremacy Clause. Collateral review vindicates the federal interest at little cost to (legitimate) state interests—for by hypothesis the state has no entitlement to imprison the accused. But of course Reed's custody is not illegal in this sense. Compliance with the IAD would not have foreclosed his conviction. Had Indiana put Reed to trial within 120 days of his transfer from federal prison, everything would have proceeded as it did. Reed does not contend that vital evidence fell into the prosecutor's hands (or slipped through his own fingers) between August 26 and September 19, 1983.

Only conditions (1) and (2) hold out hope for Reed. By now it should be clear that condition (1) does not support collateral review. *Sunal*, *Hill*, *Timmreck*, and *Stone* would have come out the other way if an error of federal law during the proceedings leading to conviction automatically yields "custody in violation of the ... laws ... of the United States." But-for causation is not enough. Neither is condition (2). That dismissal with prejudice is the *remedy* for a violation tells us nothing about the question whether the federal court may inquire into the *existence* of a violation. Statutes may call for dismissal the better to induce compliance; beefing up the remedy does not imply the need for extra layers of review. Otherwise strong remedies would get stronger, and weak remedies would stay weak. Dismissal with prejudice is appropriate for both actual innocence and commencing the prosecution one day after the expiration of the statute of limitations, but only the former justifies sequential review in state and federal court. Conditions (2) and (3) examine the same subject at

different times: condition (3) asks whether the federal norm makes conviction impossible *ex ante*, while condition (2) asks whether the federal norm calls for dismissal *ex post* if the state violates a federal rule. Condition (3) looks at the quality of the substantive rule, and condition (2) at the remedy. Collateral review should be used to enforce the important substantive rules, which determine who may and may not be convicted.

[3] All of this leads to the conclusion that *Stone v. Powell* establishes the proper framework for evaluating claims under the IAD. Accord, Note, *Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers*, 83 Colum.L.Rev. 975 (1983). Condition (4), the domain of *Stone*, is the only relevant one. The IAD does not define factual or legal guilt, so condition (5) drops out, and does not put insuperable hurdles in the way of conviction, so condition (3) also falls away. Unless a state fails to entertain and resolve claims under the IAD, collateral review is unavailable in federal court.

Indiana entertained and resolved Reed's contention that the trial began too late. It concluded that Reed had not alerted the trial judge to the potential problem either during the hearing at which the trial date was set or during the hearing at which the date was postponed. During the pretrial conference of August 1, 1983, Reed presented several arguments based on the IAD, including claims that the federal government should have held a hearing before turning him over to the state and that his treatment in Indiana fell short of the state's obligations under Art. V(d) and (h). Reed did not mention the fact that the date set for trial would fall outside the 120 days allowed by Art. IV(c). Courts often require litigants to flag important issues orally rather than bury vital (and easily addressed) problems in reams of paper, as Reed did. E.g., Fed.R.Crim.P. 30 (requiring a distinct objection to jury instructions); cf. Fed.R.Crim.P. 12(b) (a district judge may require motions to be made orally). It would not have been difficult for the judge to advance the date of trial or make a finding on the record of good cause, either of which would have satisfied Art. IV(c). Because the subject never came up, however, the trial judge overlooked the problem. Whether or not the approach of the Supreme Court of Indiana would be an independent and adequate procedural ground in support of the judgment (Respondents have not invoked *Wainwright v. Sykes*, although they cite several state cases dealing with waiver), it shows that Indiana entertained Reed's contentions without hostility to the federal statute.

[4] On one issue, however, the state court was silent. Reed contends that the failure of the federal Bureau of Prisons to give him a hearing before transferring custody to Indiana violates Art. IV(a) of the IAD. Silence may permit review under *Stone*. Reed relies principally on *Cuyler*, 449 U.S. at 443–50, 101 S.Ct. at 709–12, which held that Art. IV requires a hearing before one state may turn a prisoner over to another. The warden of the penitentiary at Terre Haute denied Reed's request, explaining: "It is the Bureau of Prison's [sic] position that inmates in Federal Custody are not entitled to the pre-transfer hearing that is referenced by *Cuyler v. Adams*." Transfer under Art. IV is a substitute for extradition. The opportunity for pre-transfer review permits a prisoner to ask the governor to decline the request for transfer. A prisoner in federal custody has no such avenue of relief. Reed does not point to any language in the IAD or any decision by a federal court requiring the federal government to extend the sort of opportunity that states traditionally have afforded in extradition proceedings. To create a parallel opportunity by implication would be to create a new rule of law, which may not properly be done in collateral proceedings. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Once again, therefore, we do not address the substance of Reed's contentions.

Our opinion has addressed the arguments of Reed's appointed counsel. By a separate brief, Reed personally advances numerous additional contentions. We have considered all of these, none of which requires discussion.

AFFIRMED.

ON PETITION FOR REHEARING

Decided April 27, 1993.

Before POSNER and EASTERBROOK, Circuit Judges, and WOOD, Jr., Senior Circuit Judge.

A petition for rehearing was filed by the petitioner in this case. All of the judges on the panel voted to deny rehearing, and the petition is accordingly denied.

A judge in active service called for a vote on the suggestion of rehearing in banc, which failed to obtain a majority. Judges Cudahy and Ripple voted for rehearing in banc.

RIPPLE, Circuit Judge, dissenting from the denial of rehearing in banc.

The panel opinion in this case is a thoughtful attempt to deal with a difficult problem upon which the circuits are in disarray and upon which the Supreme Court has given little firm guidance. *See Metheny v. Hamby*, 488 U.S. 913, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988) (White, J., dissenting from the denial of certiorari). As the state quite frankly points out in its reply to the petition for rehearing, this opinion sets us on a different course from that adopted by the other circuits. Indeed, the panel gives rather short shrift to the efforts of the other circuits by dismissing their approaches as "unlikely to get us anywhere." *Reed v. Clark*, 984 F.2d 209, 211 (7th Cir. 1993).

Before we add to the disarray among the circuits, the matter ought to be heard in banc. This course is especially advisable in light of the tension between this holding and the court's previous opinion in *Neville v. Cavanagh*, 611 F.2d 673 (7th Cir.1979), *cert. denied*, 446 U.S. 908, 100 S.Ct. 1834, 64 L.Ed.2d 260 (1980). In that case, this court refused, on comity grounds, to grant a habeas petition by a prisoner who unsuccessfully had argued an IAD violation before the Illinois Supreme Court in an attempt to block pending criminal charges. In denying the relief sought, this court stated:

> In light of the fact that Neville does seek to derail a pending state criminal proceeding, and that he may be acquitted at trial, we believe the district court was correct in denying the petition for a writ of habeas corpus at this time. *We note that this decision does not bar federal consideration of Neville's claim. Rather, it merely delays such consideration until "a time when federal jurisdiction will not seriously disrupt state judicial processes."*

Id. at 676 (footnotes omitted) (emphasis added). Under *Reed*, *Neville* cannot stand. Here the panel specifically holds:

> Unless a state fails to entertain and resolve claims under the IAD, collateral review is unavailable in federal court.

Op. at 213. *Neville*, then, clearly was a case in which the state court resolved the IAD claim against the prisoner. The court did not dismiss the habeas petition on jurisdictional grounds but held that, until a trial on the merits of the underlying indictment, the federal court would delay adjudication of the habeas petition. *Neville*, 611 F.2d at 676.

Also of note in *Neville* is the dissenting opinion of Judge Cudahy. He wrote:

> It would be extraordinarily useful in the instant case for a federal court to promptly consider and construe this interstate detainer compact because this compact attempts to provide a *nationally uniform* method of transferring federal prisoners to state courts. Such an objective can be realized only by uniform interpretation of the compact.

Id. at 678 (Cudahy, J., dissenting) (footnotes omitted). This need for uniformity in the interpretation of an interstate compact is a consideration that receives little attention in the circuit cases. Perhaps it is a factor that ought to be weighted a great deal more heavily in determining whether a "statutory claim" is cognizable on habeas.

Bhupendra C. PATEL, also known as "Ben" Patel, and Meena B. Patel, his wife, Plaintiffs–Appellants,

v.

Richard C. GAYES, M.D., Thomas Engel, M.D., and Evangelical Health Systems Corporation, doing business as Good Shepherd Hospital, an Illinois corporation, Defendants–Appellees.

No. 91–2210.

United States Court of Appeals, Seventh Circuit.

Argued April 2, 1992.

Decided Jan. 21, 1993.

Rehearing and Rehearing En Banc Denied March 29, 1993.

Patient and spouse brought medical malpractice action against physician, alleg-

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

NORTHERN DISTRICT OF INDIANA

ORRIN SCOTT REED

V.

DICK CLARK; and
INDIANA ATTORNEY GENERAL

JUDGMENT IN A CIVIL CASE

CASE NUMBER: S90-00226

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED BY CHIEF JUDGE ALLEN SHARP

that petitioner take nothing and the writ is DENIED.

September 21, 1990
Date

RICHARD E. TIMMONS
Clerk

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ORRIN SCOTT REED, Petitioner	)	
v.	)	Civil No. S 90-226
DICK CLARK; and INDIANA ATTORNEY GENERAL, Respondents	)	

MEMORANDUM AND ORDER

On May 22, 1990, pro se petitioner, Orrin Scott Reed, filed a petition seeking relief under 28 U.S.C. § 2254.[1] The return filed on August 27, 1990, demonstrates the necessary compliance with Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982). Six volumes of the state court record were filed, which the court has examined pursuant to the mandates of Townsend v. Sain, 372 U.S. 293 (1963). The court has also examined the rebuttal filed by the petitioner on September 6, 1990. Indeed, the eighteen-page rebuttal is quite lawyerlike in both form and substance and the

[1] Orrin Scott Reed certainly is not a stranger to the judiciary system. See Reed v. State, (Unpublished) 840 F.2d 920 (7th Cir. 1988); Reed v. Morton, (Unpublished) 808 F.2d 837 (7th Cir. 1986), cert. denied, 481 U.S. 1020 (1987); United States v. Reed, 392 F.2d 865 (7th Cir.), cert. denied, 393 U.S. 984 (1968); Reed v. State, (Unpublished) 546 N.E.2d 132 (Ind.App. 1989); Reed v. State, 491 N.E.2d 182 (Ind. 1986); Reed v. Duckworth, et al., S 88-77; Reed v. Duckworth, S 86-683; Reed v. State, S 86-682; Reed v. State, S 86-444; Reed v. Morton, S 86-6; Reed v. Pearson, S 85-100; Reed v. Rayl, S 84-682; Reed v. McLochlin, S 83-423; Reed v. United States, S 72-139; Reed v. United States, S 69-117.

author is to be commended even if this court does not ultimately abide by its request.

Specifically, this court has five volumes of the record of proceedings in the Fulton Circuit Court before the Honorable Douglas B. Morton and has one volume of proceedings in the same court before the Honorable R. Alexis Clark, Special Judge.

The petitioner was convicted of theft and found to be a habitual offender. He was sentenced to a term of 34 years in prison. A direct appeal was taken to the Supreme Court of Indiana, which unanimously affirmed the aforesaid conviction in an opinion authored by Justice DeBruler and reported in Reed v. State, 491 N.E.2d 182 (Ind. 1986). On August 15, 1985, the petitioner filed a pro se petition for post-conviction relief alleging that the trial court had violated provisions of the Interstate Agreement on Detainers, and that he was denied effective assistance of counsel. On August 26, 1988, the post-conviction court denied the petition, and in an unpublished memorandum decision dated October 16, 1989, the Court of Appeals of Indiana affirmed the post-conviction court's denial. See Reed v. State, 546 N.E.2d 132 (Ind.App. 1989).

In the present petition, the petitioner attached a seven-page, fourteen-numbered paragraph document which is attached as Appendix "A" hereto for immediate and convenient reference. The plaintiff's petition on its face indicates that there are post-conviction proceeding pending in the state court.

However, upon examination of the opinion of Justice DeBruler in which he dealt with eight separate issues, and paralleling the opinion to the aforesaid petition in this case, it may be presumed that the issues presented have been exhausted, since the Attorney General of Indiana does not argue otherwise. The factual setting of the case, as stated by Justice DeBruler, beginning at page 183, is as follows:

> In June, 1979, the Wabash Valley Bank foreclosed on its security interest in a 1977 Ford pick-up truck, identification number F14 SCY 89 261. Wabash Valley Bank then sold the truck to the appellate for thirteen hundred dollars in cash. In August 1979, the First National Bank of Rochester loaned M. & S. Salvage four thousand dollars; the same truck became the collateral for the loan. Appellant signed the note. The First National Bank of Rochester regarded appellant as the owner of M. & S. Salvage, and the appellant had communicated to others that he was the owner of M. & S. Salvage.
>
> On October 6, 1979, appellant reported the same truck as stolen from a K-Mart parking lot in South Bend. Auto Owner's Insurance Company paid $4,660 on the resulting loss claim. Marsha L. Reed had title to the truck and the insurance company had issued the policy in her name. Marsha Reed was actually Marsha Lee, a woman with whom appellant was living at the time. The insurance proceeds were used to pay the remaining sum of $3,101.52 to the First National Bank of Rochester on the note that appellant signed.
>
> In February 1980, state police, in executing a search warrant on the premises of M. & S. Salvage, discovered a license plate, issued to Marsha Reed for the same truck. A computer search indicated to the police that the truck had been stolen. A woman, who lived with an M. & S. Salvage employee, told the police that she saw M. & S. Salvage employees transferring parts from a blue pick-up truck to a red pick-up truck. Robert

> Smith, another employee, told the police that he had paid the appellant $300.00 for a frame and running gear on which he had placed his blue cab. Smith never received a certificate of title from appellant for the frame. Subsequently, Smith sold the reconstructed truck, to Shelton under the old truck's certificate of title. Police in Tennessee located Shelton's truck, and then discovered a concealed vehicle identification number on its frame. The number was F14 SCY 89 261; the same number on the frame of the truck appellant reported stolen from the K-Mart parking lot in South Bend.

Reed, 491 N.E.2d at 183-84. Justice Stewart, speaking for the Supreme Court of the United States in Jackson v. Virginia, 443 U.S. 307 (1979), stated:

> A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction. But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state postconviction remedies to redress possible error. See 28 U.S.C. § 2254(b), (d). What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur -- reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right -- is not one that can be so lightly abjured.

Id. at 323. The Supreme Court in Jackson held:

> We hold that in a challenge to a conviction brought under 28 U.S.C. § 2254 --if the settled procedural prerequisites for such a

> claim have otherwise been satisfied -- the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt.

Id. (footnote omitted). See also Sumner v. Mata, 449 U.S. 539 (1981); Dooley v. Duckworth, 832 F.2d 445 (7th Cir. 1987), cert. denied, 485 U.S. 967 (1988); United States ex rel. Haywood v. O'Leary, 827 F.2d 52 (7th Cir. 1987); Bryan v. Warden, Indiana State Reformatory, 820 F.2d 217 (7th Cir.), cert. denied, 484 U.S. 867 (1987); Shepard v. Lane, 818 F.2d 615 (7th Cir.), cert. denied, 484 U.S. 929 (1987); and Perri v. Director, Department of Corrections, 817 F.2d 448 (7th Cir.), cert. denied, 484 U.S. 843 (1987).

A review of the record in the light most favorable to the prosecution convinces the court that a rational trier of fact could readily have found the petitioner guilty beyond a reasonable doubt of theft.

Part II of the Justice DeBruler's opinion at page 185 deals with the issue as to the circumstantial evidence instruction. It was not an error under the law of Indiana to refuse the petitioner's circumstantial evidence instruction and it is not a constitutional error. See Bell v. Duckworth, 861 F.2d 169 (7th Cir. 1988), cert. den. ___ U.S. ___, 109 S.Ct. 1552 (1989). A very recent decision has pointed application. In Williams v. Chrans, 894 F.2d 928, 937 (7th Cir. 1990) states:

> We have jurisdiction to issue writs of habeas corpus only on the ground that the petitioner is "in custody in violation of the Constitution

or laws or treaties of the United States." 28 U.S.C. § 2241(c), 2254(a).

The second issue presented deals with the state trial court's final instruction number 12, which is dealt with in Part III of Justice DeBruler's opinion at page 185. This is a question of state law and in no sense does the giving of the same constitute reversible error. It is a fairly stock instruction that is frequently given in criminal cases in both state and federal courts.

The next issue has to do with an issue under Faretta v. California, 422 U.S. 806 (1975), as it pertains to the petitioner's constitutional right under the Sixth Amendment of the Constitution of the United States to represent himself. Justice DeBruler dealt with that issue in Part VII of his opinion.

The petitioner requested that he be allowed to represent himself at a pre-trial conference held on August 1, 1983. Certainly, that right is guaranteed in Justice Stewart's opinion for the majority in Faretta, id. In his opinion, Justice Stewart acknowledged the hard reality that most defendants who take up that adventure do themselves more harm than good. Judge Douglas B. Morton, confronted with the very difficult proposition of a defendant in a criminal case requesting to represent himself, inquired into the petitioner's determination to represent himself, and granted said request after giving the petitioner extensive warnings about the dangers of self-representation. A copy of that portion of the state trial transcript is attached

hereto and marked Appendix "B". In addition to the warnings, Judge Morton appointed Jere Humphrey, an attorney known to this court as an able and experienced lawyer, as stand-by counsel for the petitioner. Finally, Judge Morton ordered the petitioner released on bond to prepare his case approximately three (3) weeks prior to the commencement of trial.

Upon review of the record, it is clear to this court that Judge Morton certainly did what is required under Faretta v. California, 422 U.S. at 806. See Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990); Prihoda v. McCaughtry, No. 89-3479, slip op. (7th Cir., August 14, 1990). It is absurd that the petitioner is now arguing that Judge Morton violated his constitutional rights by letting him represent himself; especially in light of the fact that the petitioner requested that he be allowed to represent himself despite Judge Morton's warnings against self-representation. As evidenced by the record, the petitioner chose to represent himself, consequently, he may not turn around and complain that the quality of his own defense amounted to a denial of "effective assistance of counsel." Faretta, 422 U.S. at 834, n. 46.[2]

The next contention of the petitioner is ineffective assistance of appellate counsel, pursuant to Evitts v. Lucey, 469 U.S.

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[2]To no one's surprise, the petitioner, being the experienced litigator that he was, finally realized that he was in over his head, and at the end of the trial, requested that the trial court allow stand-by counsel, Jere Humphrey, to completely take over his defense. (T.R. 1061).

387, (1985). In a challenge to counsel's performance on appeal, the presumption of effective assistance counsel will be overcome only when ignored issues are clearly stronger than those presented. Mikel v. Thieret, 887 F.2d 733, 736 (7th Cir. 1989) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). The petitioner has failed to demonstrate that any issue not raised by counsel was significant in any degree, either by itself or by comparison with the issues which were argued. Mikel v. Thieret, 887 F.2d at 736. In post-conviction proceedings, the petitioner was represented by the state public defender's office, and it is not his province to here contend the ineffective assistance of counsel during post-conviction proceedings. See Pennsylvania v. Finley, 481 U.S. 551 (1987). Accordingly, the petitioner's claim of ineffective assistance of appellate counsel must fail.

As he did in the Supreme Court under Issue I of Justice DeBruler's opinion at pages 184-85, the petitioner raises an issue with regard to his detainer. Justice DeBruler has very carefully delineated that issue. A copy of that portion of Justice DeBruler's opinion is attached hereto and marked Appendix "C".

Upon review of the record, this court concludes that a significant amount of the delay of trial is attributable to the many motions filed either by the petitioner or filed on the petitioner's behalf. Article VI(a) of the Interstate Agreement on Detainers contains the following provision concerning the tolling of time periods:

> In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as a prisoner is unable to stand trial as determined by the court having jurisdiction of the matter.

18 U.S.C.App. III, § 2, Article VI(a). The Court of Appeals for the Seventh Circuit defines the underscored language to include "all those periods of delay occasioned by the defendant," and specifically, "the periods of delay occasioned by the ...motions filed on behalf of the defendant..." United States v. Nesbitt, 852 F.2d 1502 (7th Cir. 1988); United States v. Roy, 830 F.2d 628, 634 (7th Cir. 1987). See also United States v. Dawn, 900 F.2d 1132 (7th Cir. 1990). Accordingly, the petitioner's argument that the respondents failed to comply with the time restrictions of the Interstate Agreement on Detainers must fail.

The petitioner also complains that the state trial court erred in (1) admitting into evidence a business record of a phone conversation of the petitioner, (2) refusing to admit into evidence a police report, (3) refusing to allow the petitioner to cross-examine the police officer as to the location of the confidential vehicle identification number, and (4) admitting into evidence certified copies of petitioner's prior convictions during the habitual offender proceedings.

Justice DeBruler dealt with the evidentiary rulings in Part IV, V, and VI of his opinion at pages 186 through 187. As a general proposition, this type of ruling is committed to the discretion of state trial judges in criminal proceedings and

generally does not rise to the level of federal constitutional error unless they constitute a pervasive undermining of the basic fairness of the proceedings. In this case, it isn't even a close question. These rulings were altogether within the framework of the law of Indiana and no constitutional error is here presented.

The petitioner also complains that the state trial court erred in admitting into evidence part of the trial certified copies of his prior convictions during the bifurcated habitual offender. He contends that there is no evidence establishing that he was the same individual identified in the records admitted. This court is well aware of the mandates of Williams v. Duckworth, 738 F.2d 828 (7th Cir. 1984), cert. denied, 469 U.S. 1229 (1985). See also Jones v. Thieret, 846 F.2d 457 (7th Cir. 1988). In these proceedings, it was established that the petitioner was the same individual as the one named in the records of prior conviction by reference to his social security number, birthdate, and a certified copy of driver's record and name. This court does not conceive that this evidence fails the test announced by Judge Swygert, speaking for the majority in a divided court in Williams, 724 F.2d at 1439. No constitutional error is presented with reference to this challenge to the habitual offender proceedings.

Lastly, the petitioner complains that he was not tried within 120 days of his arrival in Fulton County, in violation of the provisions of the Interstate Agreement on Detainers, Indiana Code § 35-33-10-4. Again, Justice DeBruler has carefully

delineated the actual situation with reference to that issue in Part I of his opinion at pages 184-185. In any event, the petitioner has not made a constitutional challenge to a timely trial under the constitutional mandates of Barker v. Wingo, 407 U.S. 514 (1972). Justice DeBruler has found that petitioner's trial was within the appropriate time frame under the law of Indiana, and there is nothing in the Constitution of the United States that causes a different conclusion. This conviction is neither undermined by reason of petitioner's being denied any so-called pre-transfer hearing.

This court has carefully reviewed the entirety of this case and has given special attention to the rebuttal filed on September 6, 1990. Much of the effort is simply one to reargue the merits of the case. It must be reminded that this court is not a court of direct review, but that 28 U.S.C. § 2254 provides for a limited, narrow, but all important constitutional review of issues that have been exhausted under the mandates of such cases as Rose v. Lundy, 455 U.S. 509 (1982).

While the arguments are clearly and cogently presented in an orderly fashion, they are not convincing. Therefore, no basis is presented for the granting of a writ under 28 U.S.C. § 2254.

Writ **DENIED. IT IS SO ORDERED.**

DATED: September 21, 1990

CHIEF JUDGE
NORTHERN DISTRICT OF INDIANA

cc: Reed
Schoening
Order Book

O. Scott REED, Appellant,

v.

STATE of Indiana, Appellee.

No. 484S143.

Supreme Court of Indiana.

April 7, 1986.

Defendant was convicted by jury in the Fulton Circuit Court, Douglas B. Morton, J., of theft and was determined to be habitual offender, and received four-year sentence, which trial court enhanced by 30 years because of habitual offender determination, and defendant appealed. The Supreme Court, DeBruler, J., held that: (1) defendant failed to preserve for appeal issue that defendant was not tried within 120–day limit required by Interstate Agreement on Detainers; (2) circumstantial evidence was sufficient to prove defendant's identity as caller so as to render transcript of telephone conversation admissible; and (3) evidence was sufficient to prove beyond reasonable doubt that defendant was same person who committed prior felonies introduced at habitual offender hearing.

Affirmed.

1. Criminal Law ⇐1044.2(1)

Defendant's motions alleging various violations of Interstate Agreement on Detainers [IC 35–33–10–4], did not preserve for appeal objection that defendant was not brought to trial within 120 days, where defendant failed to raise such objection on date trial was set or date trial was reset, or during remainder of 120–day time limit. IC 35–33–10–4, 35–33–10–4, Art. 5(d, h) (1982 Ed.).

2. Criminal Law ⇐814(17)

Trial court was not required to give circumstantial evidence instruction in trial for theft, where there was direct evidence that defendant negotiated purchase of truck for $1,300, negotiated $4,000 loan with truck as collateral, reported truck as stolen and sold truck's frame. IC 35–43–4–2 (1982 Ed.).

3. Criminal Law ⇐822(16)

Instruction that jury was sole judge of weight of evidence, that evidence with greatest weight was evidence which most strongly convinced jury of truthfulness and that jury should consider all facts and circumstances in evidence to determine what evidence was of greatest weight did not confuse jury as to reasonable doubt standard applicable in trial for theft, where other instructions stated that jury must be convinced of guilt of defendant beyond reasonable doubt before defendant could be convicted. IC 35–43–4–2 (1982 Ed.).

4. Criminal Law ⇐386

Identity of declarant in telephone conversation may be established by circumstantial evidence.

5. Criminal Law ⇐386

Circumstantial evidence was sufficient to prove defendant's identity as caller so as to render transcript of telephone conversation admissible in trial for theft, where telephone conversation transcript revealed that speaker had knowledge that only defendant would be likely to know concerning his address, phone number, social security number, details and features of truck and reported theft of truck.

6. Witnesses ⇐271(3)

Refusal to admit into evidence on cross-examination police report mentioned on direct examination did not substantially impinge upon defendant's right to cross-examination in trial for theft, where defendant conducted thorough and productive cross-examination of police officer concerning such report. U.S.C.A. Const.Amend. 6.

7. Witnesses ⇐271(1)

Refusal to allow defendant to cross-examine police officer concerning location of confidential vehicle identification number, following admission into evidence of photograph of vehicle identification number, for purpose of showing possible alteration of vehicle identification number, was proper in theft trial. U.S.C.A. Const.Amend. 6; IC 35–43–4–2 (1982 Ed.).

8. Constitutional Law ⇐268.1(5)

Permitting defendant to represent himself, which resulted in difficulty in subpoenaing and deposing witnesses, due to fact that defendant was incarcerated, did not deny defendant due process of law, where court appointed standby counsel for defendant and ordered that standby counsel provide defendant with legal material and be available to file necessary motions and other pleadings, but defendant refused to properly use standby counsel. U.S.C.A. Const.Amends. 5, 14.

9. Criminal Law ⇐1203.17

Defendant's sentences for prior felony convictions were proven beyond reasonable doubt during habitual offender proceeding, where sentence for earlier felony was referred to in transcript of such cause and sentence for later felony was referred to in verdict form from later cause. IC 35–50–2–8 (1982 Ed.).

10. Criminal Law ⇐1203.17

Evidence that defendant's social security number, birthdate and physical description matched information contained in presentence report for prior larceny conviction, presentence report for larceny conviction mentioning that defendant previously received sentence for arson, which was sentence and sentencing date mentioned in transcript of prior conviction for setting fire to automobile, transcript of earliest conviction indicating year of defendant's birth, and fact that names on prior felonies were nearly identical to defendant's name was sufficient to prove beyond reasonable doubt that defendant was same person who committed prior felonies introduced at habitual offender hearing. IC 35–50–2–8 (1982 Ed.).

Jere L. Humphrey, Plymouth, for appellant.

Linley E. Pearson, Atty. Gen., John D. Shuman, Deputy Atty. Gen., Indianapolis, for appellee.

DeBRULER, Justice.

This is a direct appeal from a conviction of theft, a class D felony, I.C. § 35–43–4–2, and from a habitual offender determination, I.C. § 35–50–2–8. A jury tried the case. Appellant received a four year sentence for theft which the trial court enhanced by thirty years because of the habitual offender determination.

Appellant raises eight issues on appeal: (1) whether trial court erred in not discharging him pursuant to the Interstate Agreement on Detainers Act; (2) whether trial court erred in refusing his tendered "circumstantial evidence" instruction; (3) whether trial court erred in giving a "greatest weight of the evidence" instruction in a criminal case; (4) whether trial court erred in admitting into evidence a transcript of a telephone conversation which allegedly involved him; (5) whether trial court erred in not admitting into evidence on cross-examination a report mentioned on direct examination; (6) whether trial court erred in not permitting him to cross-examine a police officer concerning the location of a confidential vehicle identification number, (7) whether trial court denied him due process in permitting him to represent himself without, at the same time, affording him direct access to witnesses and legal facilities; (8) whether trial court erred in admitting into evidence at the habitual offender proceeding State's Exhibits # 1, # 2, # 3, # 4, and # 5.

These are the facts from the record that tend to support the determination of guilt. In June 1979, the Wabash Valley Bank foreclosed on its security interest in a 1977 Ford pick-up truck, identification number F14 SCY 89 261. Wabash Valley Bank then sold the truck to the appellant for thirteen hundred dollars in cash. In August 1979, the First National Bank of Rochester loaned M. & S. Salvage four thousand dollars; the same truck became the collateral for the loan. Appellant signed the note. The First National Bank of Rochester regarded appellant as the owner of M. & S. Salvage, and the appellant had

communicated to others that he was the owner of M. & S. Salvage.

On October 6, 1979, appellant reported the same truck as stolen from a K-Mart parking lot in South Bend. Auto Owner's Insurance Company paid $4,660 on the resulting loss claim. Marsha L. Reed had title to the truck and the insurance company had issued the policy in her name. Marsha Reed was actually Marsha Lee, a woman with whom appellant was living at the time. The insurance proceeds were used to pay the remaining sum of $3,101.52 to the First National Bank of Rochester on the note that appellant signed.

In February 1980, state police, in executing a search warrant on the premises of M. & S. Salvage, discovered a license plate, issued to Marsha Reed for the same truck. A computer search indicated to the police that the truck had been stolen. A woman, who lived with an M. & S. Salvage employee, told the police that she saw M. & S. Salvage employees transferring parts from a blue pick-up truck to a red pick-up truck. Robert Smith, another employee, told the police that he had paid the appellant $300.00 for a frame and running gear on which he had placed his blue cab. Smith never received a certificate of title from appellant for the frame. Subsequently, Smith sold the reconstructed truck to Shelton under the old blue truck's certificate of title. Police in Tennessee located Shelton's truck, and then discovered a concealed vehicle identification number on its frame. The number was F14 SCY 89 261; the same number on the frame of the truck appellant reported stolen from the K-Mart parking lot in South Bend.

I

[1] Appellant argues that the trial court should have discharged him pursuant to the Interstate Agreement on Detainers (IAD) I.C. § 35-33-10-4 because he was not tried within 120 days of his arrival in Fulton County. The pertinent sections of the statute are set forth here:

> Art. 1—[It] is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.
>
> Art. 4(c)—In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty [120] days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
>
> Art. 5(c)—If the appropriate authority shall refuse or fail to accept temporary custody of said person or in the event that an action on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article 3 or Article 4 hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

The record indicates that the Federal Penitentiary at Terre Haute transferred him to Fulton County on April 27, 1983. On May 4, 1983, on May 23, 1983, and on June 20, 1983, appellant filed separate motions alleging that his transfer to Fulton County was in violation of the IAD; he also requested a hearing on the matter. On June 27, 1983, the trial court set the trial date for September 13, 1983; which was beyond the requisite 120 day period. Appellant did not object to this trial setting. On June 29, 1983, he filed a Motion for Relief from Violations. In the motion he alleged violations of IAD § 35-33-10-4, art. 5(d) and 5(h). These allegations related to appellant's care while in the custody of Fulton County and not to the 120 day limit. On July 15, 1983, the trial court in an order made the following ruling concerning appellant's previous IAD motions.

> "That upon defendant's motion for dismissal or 'relief from violations' pursuant to the Detainer's Act, the Court does now deny the said motions; defendant has failed to provide any showing of the terms of the Act relied upon or the particular acts of the State to which he objects. There appearing on its face no violation of such Act, the court does rule accordingly."

Despite this ruling's emphasis on appellant's failure to allege specific violations of the IAD, as of this ruling, we discern that appellant alleged one specific violation: that is that Fulton County violated article 5(d) and 5(h) of the IAD in regards to the type of care he was to receive while in their custody. However, it was not until July 26, 1983, that appellant made a general demand that trial be held within the time limits of the IAD. In a pretrial conference, on August 1, 1983, the court conducted an extensive hearing on the IAD, however, appellant did not reiterate his objection based on the time limit. Subsequently, the trial court reset the trial date from September 13, 1983, to September 19, 1983. Appellant did not object to this resetting. Between August 1, 1983, and August 29, 1983, appellant's actions indicated that he intended to proceed to trial on the date as reset i.e. he filed a motion in limine, a petition for subpoena, a petition for depositions upon oral examination, and a petition for production of documentary evidence. On August 29, 1983, he filed an Affidavit of Emergency, alleging that the 120 day period had passed and that the charges against him be dismissed.

A defendant applying for discharge pursuant to the Interstate Agreement on Detainers may be precluded from relief if he fails to object to a date beyond the requisite period at the time the date was set or during the remainder of the time limit. See *Scrivener v. State* (1982), Ind., 441 N.E.2d 954, 956; *Pethtel v. State* (1981), Ind.App., 427 N.E.2d 891.

[1] Appellant claims all of his objections based on the IAD properly preserve the "120 day limit" issue for appeal. Appellant is incorrect. The relevant times when appellant should have objected were on June 27, 1983, the date the trial was set, and August 1, 1983, the date the trial was reset. However, appellant did not object at these times to the setting or resetting of the trial date beyond the requisite 120 day period. Appellant's Affidavit of Emergency on August 29, 1983, alleging the expiration of the 120 day period did not qualify as a timely objection to preserve his rights under the IAD.

II

[2] Appellant argues that the trial court erred in refusing his tendered "circumstantial evidence" instruction.

> "Instructions upon circumstantial evidence are not required to be given where the evidence of guilt is direct and positive or where some is direct and some is circumstantial." *Hitch v. State* (1972), 259 Ind. 1, 12, 284 N.E.2d 783, 789.

Faught v. State (1979), 271 Ind. 153, 390 N.E.2d 1011, 1017.

Here, there is direct evidence that appellant negotiated the purchase of the truck for $1300, that he negotiated a $4,000 loan with the truck as collateral, that he reported the truck as stolen, and that he sold the truck's frame. The existence of this direct evidence permitted the case to be submitted to the jury without a discrete instruction on how to deal with a case resting solely upon circumstantial evidence.

III

[3] Appellant argues that the trial court erred in giving a "greatest weight of the evidence" instruction in a criminal case. Appellant objected to the instruction at trial. He contends that the instruction is similar to a "preponderance of the evidence" instruction in a civil case and that, as a result, the instruction necessarily confused the jury as to the "proof beyond a reasonable doubt" standard.

The challenged instruction No. 12 is set forth here:

> You are the sole judges of the weight of the evidence. The evidence that has the greatest weight is that evidence which

most strongly convinces you of its truthfulness. You should consider all of the facts and circumstances in evidence to determine what evidence is of the greatest weight.

The weight of the evidence is not necessarily determined by the number of witnesses testifying concerning it. You may find that the testimony of a smaller number of witnesses has more strongly convinced you of its truthfulness and is therefore of the greater weight.

This instruction does not discuss the standard of proof required for conviction; it merely stresses that the truthfulness of evidence is more important than the quantity of evidence. Furthermore, we do not discern that this instruction confused the jury as to the "reasonable doubt" standard, especially in light of the other instructions the trial court submitted to the jury stating the jury must be convinced of the guilt of the defendant beyond a reasonable doubt before he can be convicted. The trial court clearly instructed the jury as to the proper standard of proof to be applied in a criminal case.

IV

Appellant argues that the trial court erred in admitting into evidence over his objection a transcript of a telephone conversation which allegedly occurred between him and an insurance company representative. He contends that the State did not lay a sufficient foundation to identify him as one of the speakers.

[4, 5] Identity of the declarant in a telephone conversation may be established by circumstantial evidence. *Indiana Union Traction v. Scribner* (1911), 47 Ind.App. 621, 93 N.E. 1014, *Greenberg v. Greenberg* (1921), 79 Ind.App. 218, 133 N.E. 18, See also, 79 A.L.R.3d 79.

> [If] the witness has received .... a telephone call out of the blue from one who identified himself as "X" this is not sufficient authentication of the call as in fact coming from X. The requisite additional proof may take the form of testimony by the witness that he is familiar with X's voice and that the caller was X. *Or authentication may be accomplished by circumstantial evidence pointing to X's identity as the caller, such as if the communication received reveals that the speaker had knowledge of facts that only X would be likely to know.*

McCormick et al. on Evid.3d HBLE, § 226.

Here, the State has proven appellant's identity as the caller circumstantially because the telephone conversation transcript reveals that the speaker had knowledge that only appellant would be likely to know i.e. his address, phone number, social security number, the details and features of the truck, and the reported theft of the truck.

V

[6] Appellant argues that the trial court erred in not admitting into evidence on cross-examination a police report mentioned on direct examination.

On direct examination, Officer Phenice referred to a police report, and he testified about the circumstances surrounding the report as follows:

Q. Did he (Gerald Smith) also volunteer anything as to where the truck came from.

A. He did. He mentioned several names. However, I only mentioned one name in the report. I did not write notes at the time. I wrote them when I went back to the office. I did cue in on one particular name that was mentioned.

Q. Who was that?

A. It was Denver Manning.

Q. Why did you cue in on that so to speak?

A. The name Denver Manning had been in other investigations I was involved with in the Gary area. I did not know who was being particularly investigated in Trooper Rayl's case. The name Manning however was put in my reports simply because that was the name I was familiar with. I

was not familiar with the other names that were mentioned.

Q. Do you remember any of the other names?

A. I do remember Scott Reed's name.

On cross-examination Officer Phenice identified his report, earlier testified to, Exhibit A, and testified that it said nothing about Scott Reed. Appellant then attempted to introduce the actual written report in order to demonstrate that it referred only to Denver Manning as a possible suspect. The State objected on the grounds that the report was superfluous in that the Officer had thoroughly testified as to its contents, and therefore, it would distract the jury.

> It is well settled that limiting the scope of cross-examination is a function within the sound discretion of the trial judge. Only upon a showing of a clear abuse of such discretion will this Court order a reversal. *Haak v. State* (1981), Ind., 417 N.E.2d 321, 322, *Cobb v. State* (1981), Ind., 412 N.E.2d 728, 739.

Wireman v. State (1982), Ind., 432 N.E.2d 1343.

Here, although the trial court refused to admit the report into evidence, appellant conducted a thorough and productive cross-examination of Officer Phenice concerning this report. Consequently, the trial court's refusal to admit the report into evidence did not substantially impinge upon appellant's right to cross-examination.

VI

[7] Appellant argues that the trial court erred in not permitting him to cross-examine a police officer concerning the location of a confidential vehicle identification number (VIN).

On direct-examination, the trial court admitted into evidence State's Exhibit # 10, a photograph of the VIN, without objection. On cross-examination, the appellant asked the police officer the following questions:

Q. Exactly where is it (the VIN) located?

A. Well, that's confidential information.

Q. Well, I don't think it should be confidential in this trial.

A. Well, that would be up to the judge

...

Court: What would the relevancy of the location be in this trial, Mr. Reed? ...

Mr. Reed: Well, If ... uh ... there are several Possibilities one that the man ... there could be more than one of these numbers, for instance. It could have been altered or made quite accessible to someone else to alter it or change it. I think that it's a piece of evidence in this case ... I should be able to cross-examine and use full knowledge about it.

The trial court then disallowed the question on the basis that there was no connection between its precise location and its possible alteration.

Appellant relies on *Burton v. State* (1984), Ind., 462 N.E.2d 207. There, only five to seven out of eleven characters of the VIN were discernible from a photograph of the VIN that the trial court admitted into evidence over defendant's objection. The defendant requested the location of the VIN in order to examine all of its characters so that he could effectively cross-examine the Officer about the VIN. The vehicle was in the custody of the police. This Court ruled that the defendant had a right to inspect the VIN on the vehicle so that he could conduct an effective cross-examination.

Here, appellant did not request to inspect the VIN on the truck, he merely wanted to know the location of the VIN. Verbal testimony at trial describing the location of the VIN, by itself, does not tend to prove or disprove that the VIN was altered; consequently, the precise location of the VIN was not then relevant, and the trial court did not prejudice appellant's right to cross-examination.

VII

[8] Appellant argues that the trial court denied him due process of law in permitting him to represent himself without, at the same time, affording him direct access to witnesses and legal facilities.

After inquiring about appellant's decision to represent himself and after giving appellant extensive warnings about the dangers of self-representation, the court appointed stand-by counsel for appellant. The trial court also ordered that stand-by counsel should provide appellant with legal materials and be available to file necessary motions and other pleadings.

Most of appellant's contentions concern the difficulty he had in subpoenaing and deposing witnesses. The source of his difficulty was the fact that he was incarcerated. Any problem appellant may have had would have been non-existent if he had used his stand-by counsel properly. The purpose of stand-by counsel is to lessen the barriers resulting from incarceration, and it provides a defendant with the opportunity to improve the quality of his self-representation. See *Engle v. State* (1984), Ind., 467 N.E.2d 712.

The trial court did not deny appellant due process of law.

VIII

[9] Appellant argues that the trial court erred in admitting into evidence during the habitual offender proceeding State's Exhibits # 1, # 2, # 3, # 4, and # 5.

> Certified copies of judgments or commitments containing the same or similar name as defendant's may be introduced to prove the commission of prior felonies. However, there must be other supporting evidence to identify defendant as being the same person named in the documents. *Estep v. State* (1979), 271 Ind. 525, 394 N.E.2d 111; *Smith v. State*, (1962), 243 Ind. 74, 181 N.E.2d 520.

State's Exhibit # 1 consists of an information and a transcript from *State v. Orrin Scott Reed*, Cause No. 2619. The information is for "setting fire to an auto," and it reveals that the date of commission for the offense was June 24, 1951. The transcript reveals that the defendant pled guilty on April 13, 1954, that he received a one to three year sentence on April 13, 1954, and that he was 22 years of age.

State's Exhibit # 2 consists of an information, a verdict form, and a pre-sentence report from *State v. Orin Scott Reed*, Cause No. 3977. The information is for grand larceny, and it reveals that the date of commission for the offense was January 14, 1959. The verdict form reveals that a jury found the defendant guilty on February 11, 1960, and that he received a one to ten year sentence on February 11, 1960. The pre-sentence report revealed the defendant's social security number as 310–30–1049, his birth date as July 18, 1931 and other descriptive information, including a conviction for arson for which he was sentenced one to three years on April 13, 1954.

State's Witness Atchley, the Fulton County Jailer, testified that Appellant told him that his social security number was 310–30–1049. State's Witness Rayl, a state police officer, testified that he transported appellant to Fulton County from the Federal Penitentiary in Terre Haute. In addition, he testified that the penitentiary records indicated that appellant's birth date was July 18, 1931.

State's Exhibit # 6 consists of appellant's driving record from the Department of Motor Vehicles. It contains appellant's social security number, 310–30–1049, birth date, July 18, 1931, and other descriptive information.

Appellant objected to State's Exhibits # 1, and # 2 on the basis that the sentences had not been demonstrated and that there was no evidence demonstrating that appellant was the same person that committed the felonies described in the exhibits.

To begin with, it is clear that the sentences were proven beyond a reasonable doubt. The sentence for the 1951 felony is referred to in the transcript in State's Exhibit # 1, and the sentence for the 1959 felony is referred to in the verdict form in State's Exhibit # 2.

[10] Second, there is sufficient evidence to prove beyond a reasonable doubt that appellant was the same person who committed the 1951 felony and the 1959 felony. The social security number, evidenced by the testimony of Atchley, by a telephone conversation transcript introduced into evidence at the guilt phase of the trial, and by appellant's driving record, matches the social security number referred to in the presentence report for the 1959 felony. The birthdate, evidenced by Rayl's testimony and by appellant's driving record, matches the birth date referred to in the presentence report for the 1959 felony. Also, the description of appellant's appearance in his driving record is substantially similar to the description of his appearance in the presentence report for the 1959 felony. This is sufficient evidence to identify appellant as the perpetrator of the 1959 felony.

The presentence report for the 1959 felony mentions that appellant received a one to three year sentence for arson on April 13, 1954. This is the sentence and the sentencing date mentioned in the transcript of the 1951 felony. The offense of arson is also substantially similar, if not the equivalent, to the offense of setting fire to an auto. Also, the transcript of the 1951 felony indicates that appellant was born in 1931 or 1932. This is sufficient to identify appellant as the perpetrator at the 1951 felony. Furthermore, it should be noted that the names on the 1951 felony and 1959 felony are nearly identical to appellant's name. This tends to give evidentiary force to the argument that appellant was the perpetrator of the 1951 felony and the 1959 felony.

Because of our conclusion that the State demonstrated that appellant committed the 1951 felony and the 1959 felony, we need not address appellant's contentions concerning State's Exhibits # 3, # 4, and # 5. Conviction and sentence affirmed.

GIVAN, C.J., and PIVARNIK, SHEPARD and DICKSON, JJ., concur.

In the Matter of William C. RUNYON.

No. 780 S 223.

Supreme Court of Indiana.

April 7, 1986.

In an attorney disciplinary proceeding, the Supreme Court held that forcing entry into former wife's apartment striking former wife with club, holding wife at gunpoint, being convicted on three felony counts of possession of firearms not registered under federal law constitute engagement in illegal conduct involving moral turpitude and engagement in conduct adversely reflecting on fitness to practice law and warrant disbarment.

Disbarment ordered.

Attorney and Client ⇐58

Forcing entry into former wife's apartment striking former wife with club, holding wife at gunpoint, being convicted on three felony counts of possession of firearms not registered under federal law constitute engagement in illegal conduct involving moral turpitude and engagement in conduct adversely reflecting on fitness to practice law and warrant disbarment. Code of Prof.Resp., DR1–102(A)(3, 6); 26 U.S.C.A. §§ 5861(d), 5871.

No appearance for respondent.

William G. Hussman, Jr., Staff Atty., Indianapolis, for the Indiana Supreme Court Disciplinary Comm'n.

PER CURIAM.

This disciplinary matter is before us on a Verified Complaint for Disciplinary Action charging the Respondent with violating Disciplinary Rules 1–102(A)(3) and (6) of the *Code of Professional Responsibility for Attorneys at Law*. On December 14, 1981, pursuant to an agreed entry, the Respondent was suspended from the practice of law pending the outcome of this case.

STATE OF INDIANA

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

DANIEL BOCK MEISER, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 317-232-1930

SUSAN KAREN CARPENTER
309 W. WASHINGTON
SUITE 501
INDIANAPOLIS IN 46204-0000

Cause Number

25A04-8903-PC-00095
LOWER CAUSE
58253 & 58255

REED, ORRIN SCOTT VS. STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 4/30/90

APPELLANT'S PETITION TO TRANSFER IS DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE. SHEPARD, C.J., DEBRULER, J., GIVAN, J., AND DICKSON, J., CONCUR. PIVARNIK, J., NOT PARTICIPATING.

WITNESS my name and the seal of said Court,

this 30TH day of APRIL, 1990

Clerk Supreme Court, Court of Appeals and Tax Court

INTERSTATE AGREEMENT ON DETAINERS

Pub. L. 91-538, §§ 1-8, Dec. 9, 1970, 84 Stat. 1397-1403, as amended by Pub. L. 100-690, title VII, § 7059, Nov. 18, 1988, 102 Stat. 4403

§ 1. Short title

This Act may be cited as the "Interstate Agreement on Detainers Act".

CODIFICATION

The Interstate Agreement on Detainers is also set out in sections 24-701 to 24-705 of the District of Columbia Code.

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"ARTICLE I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"ARTICLE II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"ARTICLE III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have

been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"ARTICLE IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"ARTICLE V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said

person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"ARTICLE VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"ARTICLE VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"ARTICLE VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"ARTICLE IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

TRANSFER OF FUNCTIONS

"Mayor of the District of Columbia" was substituted for "Commissioner of the District of Columbia" pursuant to section 421 of Pub. L. 93-198. The Office of Commissioner of the District of Columbia, as established by Reorg. Plan No. 3, of 1967, was abolished as of noon Jan. 2, 1975, by Pub. L. 93-198, title VII, § 711, Dec. 24, 1973, 87 Stat. 818, and replaced by the Office of Mayor of the District of Columbia by section 421 of Pub. L. 93-198, classified to section 1-241 of the District of Columbia Code.

§ 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 91-538, Dec. 9, 1970, 84 Stat. 1397, known as the "Interstate Agreement on Detainers Act".

TRANSFER OF FUNCTIONS

"Mayor of the District of Columbia" was substituted for "Commissioner of the District of Columbia" pursuant to section 421 of Pub. L. 93-198. The Office of Commissioner of the District of Columbia, as established by Reorg. Plan No. 3 of 1967, was abolished as of noon Jan. 2, 1975, by Pub. L. 93-198, title VII, § 711, Dec. 24, 1973, 87 Stat. 818, and replaced by the Office of Mayor of the District of Columbia by section 421 of Pub. L. 93-198, classified to section 1-241 of the District of Columbia Code.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 91-538, Dec. 9, 1970, 84 Stat. 1397, known as the "Interstate Agreement on Detainers Act".

§ 8. Effective Date

This Act shall take effect on the ninetieth day after the date of its enactment.

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 91-538, Dec. 9, 1970, 84 Stat. 1397, known as the "Interstate Agreement on Detainers Act".

The date of its enactment, referred to in text, means Dec. 9, 1970.

§ 9. Special Provisions when United States is a Receiving State

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State—

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice; and

(2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing.

(Pub. L. 91-538, § 9, as added Pub. L. 100-690, title VII, § 7059, Nov. 18, 1988, 102 Stat. 4403.)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORRIN S. REED,

Petitioner-Appellant,

v.

DICK CLARK and INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

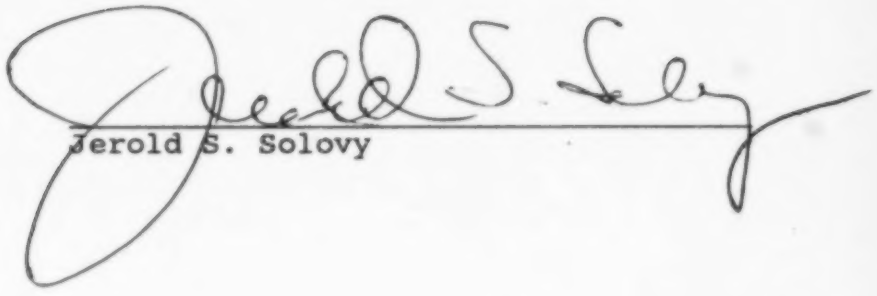
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I, Jerold S. Solovy, a member of the Bar of this Court, hereby certify that on this 26th day of July, 1993, copies of the foregoing "Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" and "Motion for Leave to Proceed In Forma Pauperis" in the above entitled case were served by first class mail, proper postage prepaid, upon attorneys for respondents:

Wayne E. Uhl
Deputy Attorney General
Indiana Attorney General
329 State House
200 W. Washington Street
Indianapolis, Indiana 46204-2794

I further certify that all parties required to be served have been served.



Jerold S. Solovy

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